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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 87

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND HAROLD A. HATCH, EXECUTORS OF THE ESTATE OF SETH M. MILLIKEN, DECEASED, PETITIONERS,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 19, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(34,995)

(34,995)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 824

SETH M. MILLIKEN, GERRISH H. MILLIKEN, AND HAROLD A. HATCH, EXECUTORS OF THE ESTATE OF SETH M. MILLIKEN, DECEASED, PETITIONERS,

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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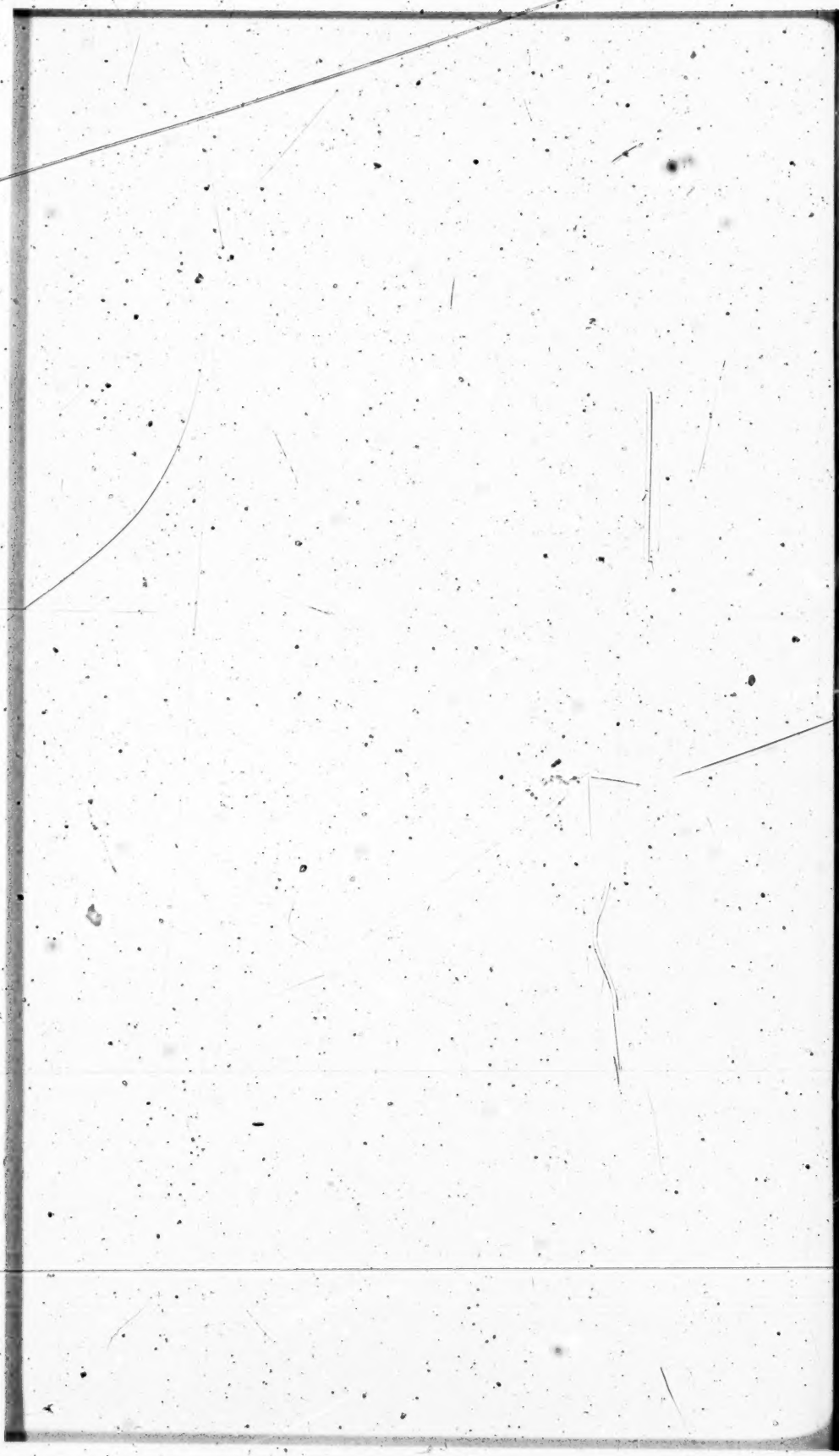


[fol. 1] IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 824.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. Hatch, as Executors of the Estate of Seth M. Milliken, Deceased, Petitioners,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

To the Honorable Supreme Court of the United States:

Your petitioners above named, Seth M. Milliken, Gerrish H. Milliken and Harold A. Hatch, as Executors of the Estate of Seth M. Milliken, deceased; by their attorney respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Claims entered in the above entitled cause on February 17th, 1930.

Question Involved

The question involved in this case is whether the provisions of Section 402(c) of the Revenue Act of 1918 (40 Stat. 1057-1152) are in violation of the provisions of the [fol. 2] Constitution of the United States and amendments thereto in so far as they purport to include as a part of the net estate of a decedent dying subsequent to the passage of that Act the property transferred by such decedent by way of gift made in contemplation of death prior to the passage of such Act, to value such property for the purpose of the tax at its value at the time of the death of such decedent, irrespective of its value at the time decedent completely and irrevocably divested himself of title thereto prior to the passage of the Act and to tax the same at the rates provided by such Act, such rates being materially in excess of those provided by the Act in effect at the time of the gift.

Statutes Involved

Following are the pertinent sections of the Revenue Act of 1916 in effect at the time the gift in question was made and of the Revenue Act of 1918 in effect at the time of decedent's death. For greater convenience of reference, the provisions of the two Acts are set forth in parallel columns.

1916 Act

(39 Stat. 777-778)

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate to be [fol. 3] determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax. See "Note".)

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take

1918 Act

(40 Stat. 1096-1097)

Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

(Here follows a table showing the rates of tax beginning at 1% on the amount of the net estate not in excess of $50,000 and running up to 25% of the amount in excess of $10,000,000.)

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(NOTE.—The rates imposed by the Act of Sep- [fol. 4] tember 8, 1916, were from 1% on the amount of the net estate not in excess of $50,000 up to 10% of the amount in excess of $5,000,000. By Section 300 of the Act of March 3, 1917 (39 Stat. 1002), this section was amended so as to provide rates from 1½% of the amount not in excess of $50,000 up to 15% of the amount in excess of $5,000,000. By Section 900 of the Act of October 3, 1917 (40 Stat. 324), an additional tax was imposed beginning at ½ of 1% on the amount of the net estate not in excess of $50,000 and running up to 10% of the amount in excess of $10,000,000.)

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Facts

The facts as stipulated by the parties before the Court of Claims of the United States and as found by said Court of Claims may be briefly summarized as follows:

Seth M. Milliken died March 5th, 1920. In December, 1916, over three years prior to his death, he had transferred by way of gift 2,713 shares of the capital stock of Minot Mills, Inc., 1,000 shares to his son Gerrish H. Milliken, 1,000 shares to his son Seth M. Milliken, and 713 shares to his daughter Margaret M. Hatch.

The petitioners in this action have waived any right to assert that such gift did not constitute a transfer in contemplation of death. Subsequent to decedent's death, peti- [fol. 5] tioners as executors of decedent's estate filed a return and supplemental return for the federal estate tax and paid the tax as shown thereunder. Such returns showed the fact of the gift in question but did not include it as part of the estate subject to tax. Later, and on or about August 5th, 1924, the Commissioner redetermined the tax due from the petitioners and included as a part of the estate subject to tax the same 2,713 shares of stock, determined the value of said shares at the time of decedent's death at the sum of $3,308,720.54 and assessed an additional estate tax in the sum of $830,917.24, of which amount the sum of $812,165.42 resulted from the inclusion of said shares of stock as a part of the taxable estate. Said additional tax was duly paid by petitioners pursuant to notice and demand therefor and thereafter, in due time and in proper manner, petitioners filed with the Commissioner of Internal Revenue a claim for the refund of said sum of $812,165.42, representing the amount assessed and paid with respect to said 2,713 shares of capital stock, alleging that such stock transfer as aforesaid did not constitute a part of decedent's estate at the time of his death and that the provisions of Section 402(c) of the Revenue Act of 1918 in so far as they purport to apply to the property in question are in violation of the Constitution of the United States and amendments thereto. Said claim was rejected by the Commissioner of Internal Revenue and in due time and proper manner suit for the refund of said sum of $812,- [fol. 6] 165.42 was begun in the Court of Claims.

Assignments of Error

I. The Court of Claims erred in holding that the provisions of Section 402(c) of the Revenue Act of 1918 purporting to include in the net estate of a decedent dying subsequent to the passage of that Act property transferred by him in contemplation of death several years prior to the passage of the Act, to value such property for the purpose of the tax at its value at the time of decedent's death, and to tax it at the rates provided by said Act, were not arbitrary and capricious and in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

II. The Court of Claims erred in holding that the said provisions of Section 402(c) of the Revenue Act of 1918 were not in violation of the third clause of Section 2 and the fourth clause of Section 9 of Article I of the Constitution in that they seek to impose a direct tax not apportioned in accordance with any census or enumeration.

III. The Court of Claims erred in entering judgment in favor of the United States.

[fol. 7] Reasons for Granting the Writ

I. The Court of Claims has decided an important issue respecting the constitutionality of a federal law which would be settled by this Court but thus far has not been directly passed upon by this Court.

II. One of the reasons assigned in the concurring opinion of Judge Graham for rendering judgment in favor of the United States was that "It has been the policy of this Court [i.e. the Court of Claims] not to adjudge an act of Congress unconstitutional." Both this opinion and the opinion of Judge Green clearly imply that the question at issue should be and presumably would be finally passed upon by this Court.

III. The decision of the Court of Claims will affect numerous other cases arising both under the 1918 Act and under subsequent Acts. The amount involved in the instant case, including interest, is upward of $1,000,000 and while the amount involved in other similar cases to which the decision in question will be applicable cannot be defi-

nitely indicated, it will undoubtedly run into many millions of dollars.

IV. The decision of the Court of Claims is contrary to the principle enunciated in numerous decisions of the United States Board of Tax Appeals arising under the 1918 and subsequent Revenue Acts and unless the issue involved [fol. 8] be definitely settled by this Court the conflict of rulings of the two bodies of similar jurisdiction will result in great confusion.

V. The decision of the Court of Claims cannot be reconciled with the principles enunciated and rules laid down by this Court in several cases involving somewhat analogous although not identical questions.

VI. The decision of the Court of Claims is to the effect that there is no constitutional limitation upon the authority of Congress to tax retroactively a gift made in contemplation of death at whatsoever rate it may see fit to impose and to value the property for the purpose of fixing the tax at a sum which bears no relation whatsoever to any value which the subject-matter of the gift may actually have had at the time when the donor completely divested himself of all interest and title in and to the property or at any other time while it was in his possession and under his control.

For these reasons, it is respectfully submitted that a Writ of Certiorari to review the judgment of the Court of Claims should be issued.

D. A. Embury, Attorney for Petitioners.

[fol. 1] In Court of Claims of the United States

J-337

Seth M. Milliken, Gerrish H. Milliken, and Harold A. Hatch, as Executors of the Estate of Seth M. Milliken, Deceased,

vs.

The United States of America

1. Petition—Filed June 4, 1928

To the Court of Claims of the United States and to the Honorable the Judges thereof:

The above named claimants, by this their petition, respectfully show as follows:

I

On March 5, 1920, Seth M. Milliken died a citizen of the United States and a resident of the Borough of Manhattan, City, County and State of New York, leaving a last Will and Testament wherein and whereby claimants were appointed executors. On or about March 20, 1920, said last Will and Testament was duly admitted to probate by the Surrogate of said County and State of New York, and letters testamentary thereon were duly issued and granted to claimants as executors on or about March 23, 1920. Claimants there-[fol. 2] upon duly qualified as executors and ever since have been and now are acting as such—all of which more fully appears by the duly authenticated copy of the record of claimants' appointment as executors filed herewith.

II

On or about March 4, 1921, within the time limited by law and the regulations in such case made and provided, the claimants duly filed with the Collector of Internal Revenue for the Second District of New York, a return for federal estate tax for the Estate of said Seth M. Milliken, deceased, and on or about August 31, 1921, the claimants filed with the said Collector a supplemental return. At the time of filing said supplemental return on August 31, 1921, the claimants paid or caused to be paid to the said Collector the sum of $1,552,653.88, being the total amount of tax shown by both of said returns.

III

Thereafter, on or about February 5, 1926, within the time limited by law as extended by waivers filed by claimants, the Commissioner of Internal Revenue determined and assessed against claimants as executors of the Estate of said Seth M. Milliken, deceased, an additional federal estate tax of $830,917.24, of which amount $812,165.42 resulted from the inclusion in the gross estate of the value of 2,713 shares of capital stock of Minot Mills, Inc., a Delaware corporation, transferred, set over and assigned in December, 1916, by the decedent to his two sons and his daughter.

[fol. 3]

IV

On March 10, 1926, pursuant to notice and demand made by the Collector of Internal Revenue for the Second District of New York and in order to avoid the imposition of interest and penalties threatened, the claimants paid the said additional tax of $830,917.24, said payment being made under protest with respect to $812,165.42 thereof.

V

On March 12, 1926, within the time and in the manner prescribed by law and the Regulations in such case made and provided, the claimants duly filed with the Commissioner of Internal Revenue through the office of the Collector of Internal Revenue for the Second District of New York, a claim for the refund of said $812,165.42, a true copy of which refund claim is hereto annexed, made a part hereof and marked Exhibit A.

VI

By letter dated June 25, 1926, a true copy of which is hereto annexed, made a part hereof and marked Exhibit B, the Commissioner of Internal Revenue rejected the said claim for refund in its entirety.

VII

Section 402 of the Revenue Act of 1918, which was the law in force at the time of the death of said Seth M. Milliken, provides in part, as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the [fol. 4] time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment

at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;".

VIII

That the provisions of the Revenue Act of 1918 and, specifically, of Section 402(c) thereof, in so far as they purport to be retroactive and to tax the said transfers made in December, 1916, and before the enactment of said Act, are arbitrary, confiscatory, invalid and in violation of the Constitution of the United States and of the provisions of Article One thereof and of the Fifth Amendment thereto, and that therefore the said assessment and collection of said additional estate tax to the extent of $812,165.42 were erroneous, wrongful and illegal and in violation of claimants' constitutional rights.

[fol. 5]

IX

Claimants have complied with all acts of Congress and Regulations of the Secretary of the Treasury and of the Commissioner of Internal Revenue pertaining to the filing of estate tax returns and claims for refund and for the recovery of Internal Revenue taxes alleged to have been erroneously and illegally assessed or collected or to be excessive or in any manner to have been wrongfully collected; a claim for refund was duly filed with the Commissioner of Internal Revenue as hereinbefore set forth; more than six months have elapsed since the filing of said claim for refund and the Commissioner of Internal Revenue has rendered a decision thereon rejecting said claim for refund in its entirety. Five years have not elapsed since the payment of said additional tax of $830,917.24 as hereinbefore set forth; nor have two years elapsed since the disallowance of said claim for refund by the Commissioner of Internal Revenue as aforesaid.

X

Claimants represent that they (and the said Seth M. Milliken, deceased) have at all times borne true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted or given encouragement to rebellion against such Government; and have not aided or abetted or given comfort to any sovereign or government that has been at war with such Government; that as executors of the Estate of Seth M. Milliken, the claimants are the sole and absolute owners of the claim herewith presented; that no transfer or assignment of said claim or of any part thereof has been made; that no other action than as aforesaid has been taken on this claim in Congress or in [fol. 6] or by any of the Departments or in any court other than this proceeding in this Court and that as executors of the said Estate the claimants are justly entitled to the amount claimed herein from the United States after allowing all just credits and offsets.

XI

Claimants believe the facts as stated in this petition to be true, and file this petition to recover from the United States the sum of $812,165.42 paid to the Collector of Internal Revenue of the Second District of New York and turned over by him to the United States in the usual course of his business, the whole of said sum at this time being retained and held by the United States, together with interest thereon from the date of payment.

Wherefore claimants pray judgment against the United States of America upon the facts and law for the sum of $812,165.42, with interest thereon from March 10, 1926.

Respectfully submitted.

Seth M. Milliken, Gerrish H. Milliken, Harold A. Hatch, Executors of the Estate of Seth M. Milliken, Deceased. D. A. Embury, 30 Broad Street, Borough of Manhattan, City of New York, Attorney of Record. Curtis, Mallet-Prevost, Colt & Mosle, of Counsel.

[fols. 7-9] Duly sworn to by Seth M. Milliken et al. Jurats omitted in printing.

[fol.10] EXHIBIT A TO PETITION

Form 843—Jan., 1922—Comptroller General U. S.—January 18, 1922

(Execute Separate Form for Each Tax Period).

Treasury Department, Internal Revenue Service

Claim for

( ) Abatement of Tax Assessed

( ) Credit Against Outstanding Assessments

(x) Refund of Taxes Illegally Collected

( ) Refund of Amounts Paid for Stamps Used in Error or Excess

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation: District, ——; Account number, ——; Date received: ——; Stamp here. —— ——, Collector of Internal Revenue.

Date received by Administrative Unit: Stamp here: ——.

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases

State of New York, County of New York, ss:

Type or Print: (Name of taxpayer or purchaser of stamps.) Gerrish H. Milliken, Seth M. Milliken, and Harold A. Hatch, as Executors of the Estate of Seth M. Milliken, (Residence—Give street and number as well as city or town and State.) 79 Leonard Street, New York City (Business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the

taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From:	19
To:	19

1. Business in which engaged: ——.

2. Character of assessment or tax: Estate tax. (State for or upon what the tax was asessed or the stamps affixed.) [fol. 11] 3. Amount of assessment or stamps purchased: $2,383,557.51.

4. Reduction of Tax Liability requested (Income and Profits Tax): $812,165.42.

5. Amount to be abated: None.

6. Amount to be refunded (or such greater amount as is legally refundable): $812,165.42.

7. Dates of payment (see Collector's receipts or indorsements of cancelled checks): 8/31/21. 1,552,640.27.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.) 3/10/26 830,917.24.

8. District in which return (if any) was filed: Second District, N. Y.

9. District in which unpaid assessment appears: None.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked; period from —— to ——: None.

Deponent verily believes that this application should be allowed for the following reasons:

The sum of $812,165.42 covered by the present claim for refund represents estate tax purported to be assessed under the Revenue Act of 1918 in respect to 2713 of the shares of Minot Mills, Inc. (valued as of decedent's death at $3,308,720.54) which had been transferred by the decedent Seth M. Milliken in December, 1916, as follows:

To his son Gerrish H. Milliken	1,000 shares
" " " Seth M. Milliken	1,000 "
" " daughter Margaret M. Hatch.	713 "

The said shares were so transferred by the decedent more than three years before his death and more than two years before the passage of the Revenue Act of 1918. The

assessment of estate tax in respect thereof was illegal, invalid and unauthorized because the said shares were not part of the decedent's estate at the time of his death and because the provisions of the Revenue Act of 1918 in so far as they purport to tax such transfers made before the [fol. 12] passage of said Act are in violation of the Constitution of the United States and the amendments thereof.

(Attach additional sheets if necessary.)

(Signed) Seth M. Milliken, Gerrish H. Milliken, Harold A. Hatch, Executors of the Estate of Seth M. Milliken.

Sworn to and subscribed before me this 12 day of March, 1926. R. B. Horton, Ralph B. Horton, (Title.) Notary Public, Richmond County. (Notarial Seal.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 13] EXHIBIT B TO PETITION

[SEAL.]

Treasury Department, Washington, Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to MT-ET-C1-R-1865-RKS.

District of 2d New York.

Estate of Seth M. Milliken.

Date of death: March 5, 1920.

Jun. 25, 1926.

Gerrish H. Milliken et al., executors estate of Seth M. Milliken, 79 Leonard Street, New York, New York.

SIRS: The Bureau has examined the claim, filed by you as executors of the above named estate, for refund of $812,165.42 of the Federal estate tax paid under the provisions of the Revenue Act of 1918.

The claim is based upon the contention that the assessment and collection of the estate tax in respect of transfers

made by the decedent prior to the passage of the Revenue Act of 1918, was unlawful and illegal because the provisions of the Revenue Act of 1918, in so far as they purport to tax transfers made before the passage of said Act, are in violation of the Constitution of the United States.

[fol. 14] It is the duty of the Internal Revenue Bureau as a part of the administrative branch of the Government, to administer the laws as passed by Congress.

In view of the foregoing, your claim for refund of $812.165.42 is rejected in its entirety.

Respectfully, D. H. Blair, Commissioner.

aho.

[fol. 15] II. General Traverse—Filed July 14, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

F. K. D.

III. Argument and Submission of Case

On December 10, 1929, this case was argued and submitted on merits by Mr. David A. Embury, for the plaintiffs, and by Mr. Fred K. Dyar, for the defendant.

[fol. 16] IV. **Special Findings of Fact, Conclusion of Law, Opinion of the Court by Green, J., and Concurring Opinion by Graham, J.**

Mr. D. A. Embury for plaintiffs. Curtis, Mallet-Prevost, Colt & Mosle were on the briefs.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant. Messrs. William E. Davis and William T. Sabine were on the brief.

This cause having been heard by the Court of Claims, the court, pursuant to and in accordance with the stipulation of the parties filed herein, makes the following

Special Findings of Fact

1. On March 5, 1920, Seth M. Milliken died, and in the latter part of March of the same year plaintiffs were duly appointed executors of his estate and qualified as such.

2. In 1921 plaintiffs filed a return and supplemental return for Federal estate tax to be paid by said estate, and paid the tax due according to such returns. These returns did not include in the property of decedent subject to tax 2,713 shares of the capital stock of Minot Mills (Inc.); the taxability of which is at issue in this case, but did show that in December, 1916, this stock had been transferred by way of gift by decedent—1,000 shares to his son, Gerrish H. Milliken, 1,000 shares to his son, Dr. Seth M. Milliken, and 713 shares to his daughter, Margaret M. Hatch. This stock was so transferred in December, 1916, and plaintiffs have waived any right to assert that the transfer of said 2,713 shares of capital stock of Minot Mills (Inc.), made as aforesaid, was not as a matter of fact a transfer by the decedent in contemplation of death.

3. Afterwards and on August 5, 1924, the commissioner made a redetermination of the tax due from plaintiffs, and about February 5, 1926, within the time limited by law as extended by waivers theretofore filed by plaintiffs, assessed against plaintiffs, as executors of the estate of said Seth M. Milliken, deceased, an additional Federal estate tax of $830,917.24, of which amount the sum of $812,165.42 re[fol. 17] sulted from the inclusion in the gross estate of the said 2,713 shares of capital stock of Minot Mills (Inc.), valued by the Commissioner of Internal Revenue for the purpose of the Federal estate tax at their value at the time of decedent's death in the sum of $3,308,720.52, and included in such gross estate and tax, pursuant to the provisions of section 402 (c) of the revenue act of 1918, as a gift made by decedent in contemplation of death.

About March 10, 1926, pursuant to notice and demand made by the collector of internal revenue, plaintiffs paid the said $830,917.24. Thereafter, in due time and in proper

manner, the plaintiffs filed with the Commissioner of Internal Revenue a claim for the refund of $812,165.42, representing the amount of the Federal estate tax assessed and paid with respect to the said 2,713 shares of capital stock of Minot Mills (Inc.), as aforesaid, which claim was rejected by the commissioner.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiffs are not entitled to recover and their petition is therefore dismissed.

Judgment is rendered against the plaintiffs in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This is a suit to recover $812,165.42 alleged to have been wrongfully collected as additional estate taxes. Plaintiffs filed a claim for refund thereof which was denied by the commissioner.

The facts in the case are not in dispute.

The plaintiffs are executors of the estate of Seth M. Milliken, who died on March 5, 1920. In December, 1916, the testator transferred by way of gift 2,713 shares of capital stock of Minot Mills (Inc.). After the death of the decedent the plaintiffs filed a return for the purposes of the tax upon his estate. In so doing they failed to include the 2,713 shares of stock above referred to. The commissioner held that this stock had been transferred in contemplation of death and that the value thereof should have been included as a part of the gross estate. For the purpose of the Federal estate tax he fixed the value thereof at the time of the decedent's death in the sum of $3,308,720.54. By reason of this action an additional tax of $812,165.42 was assessed against the estate of the decedent. The plaintiffs paid this additional tax and their application for refund thereof having been denied, now bring this suit,

but do not contend that the stock involved was not transferred in contemplation of death.

The issue in the case is whether the commissioner correctly included the shares of stock above referred to in the gross estate.

The decedent died in March, 1920, and the commissioner applied the provisions of the revenue act of 1918 in determining the tax against his estate, the 1916 act being then repealed. The transfer was by way of gift, and section [fol. 18] 402 of the revenue act of 1918 directs that the gross estate of the decedent shall be ascertained by including (among other things) the value at his death of all property—

"To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth."

This language is so plain and definite that it is clear that this section applies to the transfer under consideration in this case, although it was made prior to the passage of the 1918 act. Plaintiffs do not question this construction of the statute, but contend that when applied to gifts made prior to the time when the revenue act of 1918 went into force, the statute is unconstitutional. This constitutes the question to be determined in the case.

Nichols v. Coolidge, 274 U. S. 531, is cited as supporting the contention of the plaintiffs. In that case it appeared that the decedent and her husband had in July, 1907, transferred certain property without consideration to trustees who agreed to hold it and pay the income to the settlors, then to the survivor, and thereafter to dispose of it in a manner not necessary here to repeat. On April 6, 1917, the settlors assigned to their children their entire interest in the property. In May, 1917, the decedent and her husband conveyed absolutely certain other property to their children, but we are here concerned only with the application of the law made by the Supreme Court to the transfer

first above set forth. The death of the decedent occurred in January, 1921. Her executors made a return under the revenue act of 1918 (approved February 24, 1919) which did not include the property first transferred. The commissioner held that under the provisions of section 402 (c) of said act, which are above set forth, the value of all this property at her death must be included in the gross estate.

The Supreme Court found that the transfer was not made in contemplation of death and held that section 402 (c)—

"* * * in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confication";

and in giving its reasons for holding the statute arbitrary said:

"An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must [fol.19] bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See Frew v. Bowers, 12 Fed. (2d) 625."

One fact which is recited above is not found in the case at bar. In the Coolidge case, supra, the transactions are said to be "not testamentary in character," by which we understand the court to mean that they were not made in contemplation of death as a part of a plan of distributing the estate of the grantor by conveyance instead of by will. In fact the court in another part of the opinion, states expressly that the transfers were not made in contemplation of death. It is true that the court said in this connection that "undoubtedly, Congress may require that property subse-

quently transferred in contemplation of death be treated as part of the estate for purposes of taxation." Counsel for plaintiffs argue that it is a fair inference from this language that conveyances made prior to the taxing statute under such circumstances would not be subject to taxation, but we think that what the court intended to have understood was that there was no doubt about such transfers being subject to the tax when made after the enactment of the statute, but as to those made prior thereto it was an open question when they were made in contemplation of death.

As the transfer under consideration in the case at bar was made in contemplation of death, it become necessary to determine this question.

If we consider only cases where the statute is not retroactive, we find in the language hereinabove quoted from the Coolidge case that "undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation." If this be true, it is quite clear that such a statute is not arbitrary and capricious and cannot be held unconstitutional on that ground, although on first consideration it might appear that some of the language used in the Coolidge case and in other cases might apply thereto as a reason for holding it invalid. But when we apply the statute to transfers made in contemplation of death, the whole aspect of the case is changed, and the reasons which the court gave for holding the conveyances in the Coolidge case not subject to tax do not apply in the case at bar.

In the instant case, the maker of the transfer, as in practically all cases where a conveyance is made in contemplation of death, was using the conveyance to dispose of or distribute his property instead of a will. His purpose was to make this disposition before death intervened to terminate his control thereof. In its effect it differed but little from disposition by will. If another owner of property disposed of all his property by will, the law required from his estate a tax based on the value thereof. What reason can be given why the estate of the man who transfers a part of his property in contemplation of death should not pay the same tax as the one who transfers it by will? None, we think, but on the contrary it appears that a provision for taxing property so conveyed in contemplation of death as part of

the estate is reasonable and just, and makes for equality between taxpayers rather than inequality, which would otherwise exist. If these conclusions are correctly drawn, it is clear that such a tax is not arbitrary or capricious. [fol. 20] Another forcible and distinct reason for holding such a tax valid is, as stated in the Coolidge case, that it is necessary to prevent evasion. It is perfectly evident that if the owner of an estate, after he had reason to believe that death was nigh, could in contemplation thereof distribute his property by gift instead of by will, the means of avoiding the estate tax would be so apparent and easy, avoidance would become the rule and the payment of the tax the exception. Moreover, in such event, those who were interested in estates conveyed by will could justly complain of the unfair and unjust situation in which they were placed as compared to those who were purposely avoiding the estate tax. It is well settled that when the general purpose of a legislative act is within the admitted power of the Government that the legislative body, as said in Purity Extract Co. v. Lynch, 226 U. S. 192, 201, "may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective"; and further in the same case: "It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." This is especially true where the purpose of the act is in part to prevent evasion, and while so far only transactions occurring after the passage of the act have been discussed, it ought also to be said in this connection that the provision in the statute which made it apply to prior transactions was undoubtedly intended to prevent evasion by making conveyances before the act could go into force. Such provisions have been held valid in tariff acts.

It may be thought at first that it is not necessary to elaborate these reasons for holding that the tax on gifts made in contemplation of death is not arbitrary when the Supreme Court has already held that the tax is constitutional when applied to transactions prior to the enactment of the law which imposed it, but these matters are here discussed because they show that the grounds for holding such a tax

not to be arbitrary are exactly the same whether the statute is applied to a transfer made after its enactment or before it went into effect, and vice versa no reason can be given for holding the statute to be arbitrary when applied to transactions that took place before its enactment that would not apply equally well to those which occurred after it went into force.

It is urged on behalf of plaintiffs that the retroactive features of the act violate the due process clause of the fifth amendment, and that the act further violates the due process clause of the same amendment by the manner in which the gross estate is computed; also that the act, in so far as it applies to property not owned by the decedent at the time of his death but transferred by way of gift prior thereto, imposes a direct tax which is void for want of apportionment. These statements are general and the matters which form the principal basis for the attack on the act may be more specifically stated as follows:

First, that the value of property which the decedent has ceased to own—in other words, the property of another—is used to measure the amount of the tax.

[fol. 21] Second, that the tax as imposed by the act is not a tax on the transfer of the property of the decedent but a tax on property itself not owned by him at the time of his death.

Third, that the decedent when he parted with the title to this property could not anticipate that the tax now sought to be levied would be imposed.

It is perfectly clear that the first two of these matters might be urged with as much force in a case where the act, after its enactment, was applied to a transfer in contemplation of death as they could to a transfer made prior thereto. In both cases the value of property which the decedent had ceased to own is used to measure the tax; in both cases the matters stated in the second objection if applicable at all would apply equally. When we examine the third objection closely we find that it can be made against all or nearly all acts which have provided for the retroactive application of taxes, and if held to be sufficient by itself and alone to render the act in question invalid, the same rule applied would make all retroactive taxing statutes unconstitutional. The answer then to the first two of these objections is that the

Supreme Court has held that these matters will not invalidate a tax upon a transfer made in contemplation of death. Possibly the third objection in view of what has been stated needs no further answer. It may be contended, however, that some of the language used by the majority opinions in the cases of Blodgett v. Holden, 275 U. S. 142, and Untermyer v. Anderson, 276 U. S. 440, tends to support the claim that no retroactive estate tax is valid, but these statements are general and must be held applicable only to the particular facts in the cases as to which the opinions were rendered. Until the Supreme Court should specifically so state, we can not believe that it intended by anything it has said in these two cases last cited to overrule the general principle that a law of Congress imposing a tax may be retroactive in its operation, which has prevailed so long as to be considered settled doctrine. We think it is not without significance that in each case the court made it clear that it was not ruling on a case where the transfer was made in contemplation of death, and that the court has in three cases, where the validity of retroactive estate and gift taxes was involved, emphasized the fact that in the case under consideration the transfer in question was not made in contemplation of death. By reason of this feature of the case at bar we conclude that the tax in question is not unconstitutional.

Counsel for defendant contends that the tax in fact was not retroactive but was merely a continuation with a changed rate of the statute that had previously ben in force, but the conclusions we have heretofore reached make it unnecessary to consider this proposition.

It follows that plaintiffs petition must be dismissed and it is so ordered.

Williams, Judge; Littleton, Judge, and Booth, Chief Justice, concur.

CONCURRING OPINION

GRAHAM, Judge, concurring in the result:

The petitioners are executors of the estate of Seth M. Milliken, deceased. The taxing act of 1916 was passed on the 8th day of September, 1916. In December of 1916 the

[fol. 22] said Milliken made a gift in contemplation of death and transferred 2,713 shares of the stock of Minot Mills, Inc., to his three children. Between the date of the gift and the date of his death the act of 1918 was passed, becoming effective in February, 1919. The testator died on March 5, 1920. The act of 1916 and the act of 1918 each contained provisions levying a tax on gifts made during life but "in contemplation of death." The pertinent sections [1] of the acts are in footnote.

---

[1] Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (39 Stat. 777-778.)

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this act*) except in case

It will be seen from an examination of these sections in the two statutes that they are verbatim except the language (in the act of 1918) "at any time" and "whether such transfer or trust is made or created before or after the passage of this act." Under the facts here it is to be noted—

(1) That the gift in this case was not made before the passage of the act of 1916 but after, and would clearly have been taxable under that act had the 1918 act not been passed or if the testator had died the day before the passage of the act of 1918.

(2) That as this gift was made "in contemplation of death," it would not make any difference when the testator died. It was liable for tax when he did die, unless Congress by some act relieved the property of liability to taxation, and the inchoate liability having already attached, it is a reasonable construction of the retroactive clause as to this case and similar ones that Congress at least intended the provision to reach such cases and had them in mind, therefore intending by the act of 1918 to continue into the act of 1918 an inchoate liability incurred under the act of 1916. If this be true, it is reasonable to hold that it did not intend to repeal the act of 1916 as to such cases.

(3) But we are not left with only this view to stand upon. Congress in the act of 1918, after repealing certain titles of the acts of 1916 and 1917, among them Title II of the act of 1916, which included the sections quoted in footnote, used this language (40 Stat. 1150):

"Such parts of acts [meaning acts repealed] shall remain in force for the assessment and collection of all taxes which have accrued thereunder, * * * Provided, That, except as otherwise provided in this act, no taxes shall be collected

---

of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (40 Stat. 1097.) (Italics mine.)

under Title I of the revenue act of 1916 [which contains the sections involved here] as amended by the revenue act of [fol. 23] 1917, or Title I or II of the revenue act of 1917, in respect to any period after December 31, 1917. [Note the language, "except as otherwise provided in this act."] Provided, further, That the assessment and collection of all estate taxes * * * which have accrued under Title II of the revenue act of 1916 * * * shall be according to the provisions of Title IV of this act [which contains the sections involved here]. In the case of any tax imposed by any part of an act herein repealed, if there is a tax imposed by this act in lieu thereof, the provisions imposing such tax shall remain in force until the corresponding tax under this act takes effect under the provisions of this act."

The tax here "imposed was by" a part of the act of 1916 and the tax imposed by the provision of that act "was imposed by this act [1918] in lieu thereof," and, therefore, "the provisions imposing such tax [1916] shall remain in force until the corresponding tax under this [1918] act takes effect" under its provisions.

Whatever this provision may mean generally, it covers this case and seems to show an intention to carry forward the provision of the act of 1916 into the act of 1918 and make it effective under the provisions of that act by reenacting it, and that as to such reenactments the provision as to repeal would not be effective. This view of the matter is strengthened by the additional language in section 402 (c) of the act of 1918, viz. "whether such transfer or trust is made or created before or after the passage of this act."

According to the construction presented by the petitioners, we would have this situation, namely, that had the donor died the day before the act of 1918 became effective there would have been no question of liability, but if he had died the day after the passage of that act there would be no liability, because the act of 1916 had been repealed and the liability released thereby. Rather than hold that Congress contemplated such an effect by the repealing clause of the act of 1918, it is more reasonable to hold that Congress by reenacting the very words of sections 201 and 202 (b) of the act of 1916 into the act of 1918 intended the 1918 act, as to these sections, to be a continuation of the 1916 act, and that as to these sections of the act of 1916 which were thus re-

enacted it intended that the repeal should not apply. This construction imposes no hardship upon them.

Under the facts of this case there is nothing capricious or arbitrary in the retroactive clause as thus construed. Where the subsequent act from its provisions gives reasonable grounds for holding that it was a continuation of the previous act, even though there has been a formal repeal, it will be held to be a continuation of the old act with modification contained in the new. See the following cases: Campbell v. California, 200 U. S. 87; Steamship Co. v. Joliffe, 2 Wall. 450, 458, 459; Gulf, Colo. & Santa Fe Railway Co. v. Dennis, 224 U. S. 503, 507; Wright v. Oakley, 5 Metcalf, 400; and Bear Lake and River Water Works and Irrigation Co. v. Garland, 164 U. S. 1, 11, 12.

In the case of Campbell v. California, 200 U. S. 87, in which the court cited with approval the Joliffe and Wright cases, the court spoke of the general and continuing nature of the legislation contained in the statute. The legislation involved in the Campbell case was an inheritance tax law [fol. 24] The facts in the case of Steamship Co. v. Joliffe, supra, which is a leading case, were that a pilot under a contract authorized by statute earned certain pilot fees. The act authorizing the fees was repealed. The court in holding that the second act was a continuation of the first in spite of the repealing clause, said:

"* * * The new act reenacts substantially all the provisions of the original act, relating to pilots and pilot regulations for the harbor of San Francisco. It subjects the pilots to similar examinations; it requires like qualifications; it prescribes nearly the same fees for similar services; and it allows half-pilotage fees under the same circumstances as provided in the original act. * * * The new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them."

And the court in its opinion quotes the following language of Chief Justice Shaw in Wright v. Oakley, 5 Metcalf, 406:

. . . but these repeals went into operation simultaneously with the Revised Statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the Revised Statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones.

In Gulf, Colo. & Santa Fe Railway Co. v. Dunn, supra, where there was involved a statute containing a simultaneous repeal and reenactment of a prior statute, the court said:

"During its pendency in this court the legislature of the State passed a new statute embodying the provisions of the prior law, with some modifications, and also in terms repealing it. The point was then made that the repealing clause terminated the right to recover, and therefore that the action could no longer be maintained. And while the question whether the simultaneous reenactment and repeal of the prior law interrupted its continuity was a question of local law, upon full consideration and the conclusion was reached that in practical operation and effect there was no repeal, but only a continuance of the prior law. . . ."

In the Boise Lands and Water Works and Irrigation Co. case, supra, it is said:

". . . although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1881 when those sections have not been in force. . . . Considering, therefore, that formal repeal, it is, as we think, entirely correct to say that the new act should in contemplation be a continuation of the old with the modifications contained in the new act."

The case cited with approval Steamship Co. v. Joliffe, supra.

In all of these cases it was held that the mere repeal does not make the question of the application of a statute a moot question, and that if the enjoyment act is of the general and continuing nature of the legislation contained in the

[fol. 25] previous act," they should be treated as one act.

I am the more impelled to this construction of the act as it eliminates the question of constitutionality of the act of 1918. In passing upon the constitutionality of a law it has been the undeviating rule of the Supreme Court to so construe the act involved as to uphold, if possible, its constitutionality. It is a rule of which the courts must be carefully mindful in the performance of this "gravest and most delicate duty." It is well settled that among other matters to be taken into consideration as to two interpretations of a statute, the one destroying and the other saving the constitutionality of the act, it is the court's duty to adopt the latter. The right of the Federal courts to declare an act of Congress unconstitutional has been upheld and accepted, though there have been charges of judicial usurpation at different periods in the history of the country, even within the last decade, but the annulment of an act on constitutional grounds must be avoided if possible, and the courts have even gone the length of giving very strained constructions to statutes in order to accomplish this purpose. See United States v. Jin Fuey Moy, 241 U. S. 394, 401, 402, and United States v. Delaware & Hudson Company, 213 U. S. 366, 407, 408.

There is still another view of this case. As stated, this is a case of a gift "in contemplation of death." In this it differs from the cases of Nichols v. Coolidge, 274 U. S. 531, 541, in which the court said:

"* * * The right to become beneficially entitled is not the occasion for it. There is no claim that the transfers were made in contemplation of death or with purpose to evade taxation."

And in Blodgett v. Holden, 275 U. S. 142, 146, the court said:

"* * * transferred by gifts inter vivos, and not in contemplation of death, * * *."

In Untermyer v. Anderson, 276 U. S. 440, 445, it was stated:

"* * * And, further, that so far as applicable to bona fide gifts not made in anticipation of death and fully con-

summated prior to June 2, 1924, those provisions are arbitrary and invalid under the due process clause of the fifth amendment."

It thus seems that in these three cases, in holding a taxing act for the purpose of raising revenue unconstitutional under the particular facts of those cases, the case of gifts made "in contemplation of death" was expressly reserved, and the language of the court seems to indicate that in those cases, if the gifts had been made "in contemplation of death," the decision might have been different.

As it has been the policy of this court not to adjudge an act of Congress unconstitutional, and of the Supreme Court, as heretofore stated, to construe an act so as to uphold its constitutionality if possible, and in view of the interpretation which I give the act of 1918 as a continuation of the act of 1916 as far as the sections of the act in dispute here are concerned, and the evident exception from the three decisions supra of gifts made in contemplation of death, I concur in the result reached by the court.

V. JUDGMENT

[fol. 26] At a Court of Claims held in the City of Washington on the 17th day of February, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover and their petition is therefore dismissed.

Judgment is rendered against the plaintiffs, in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law. No printing having been done by the court in this case, no costs are taxed.

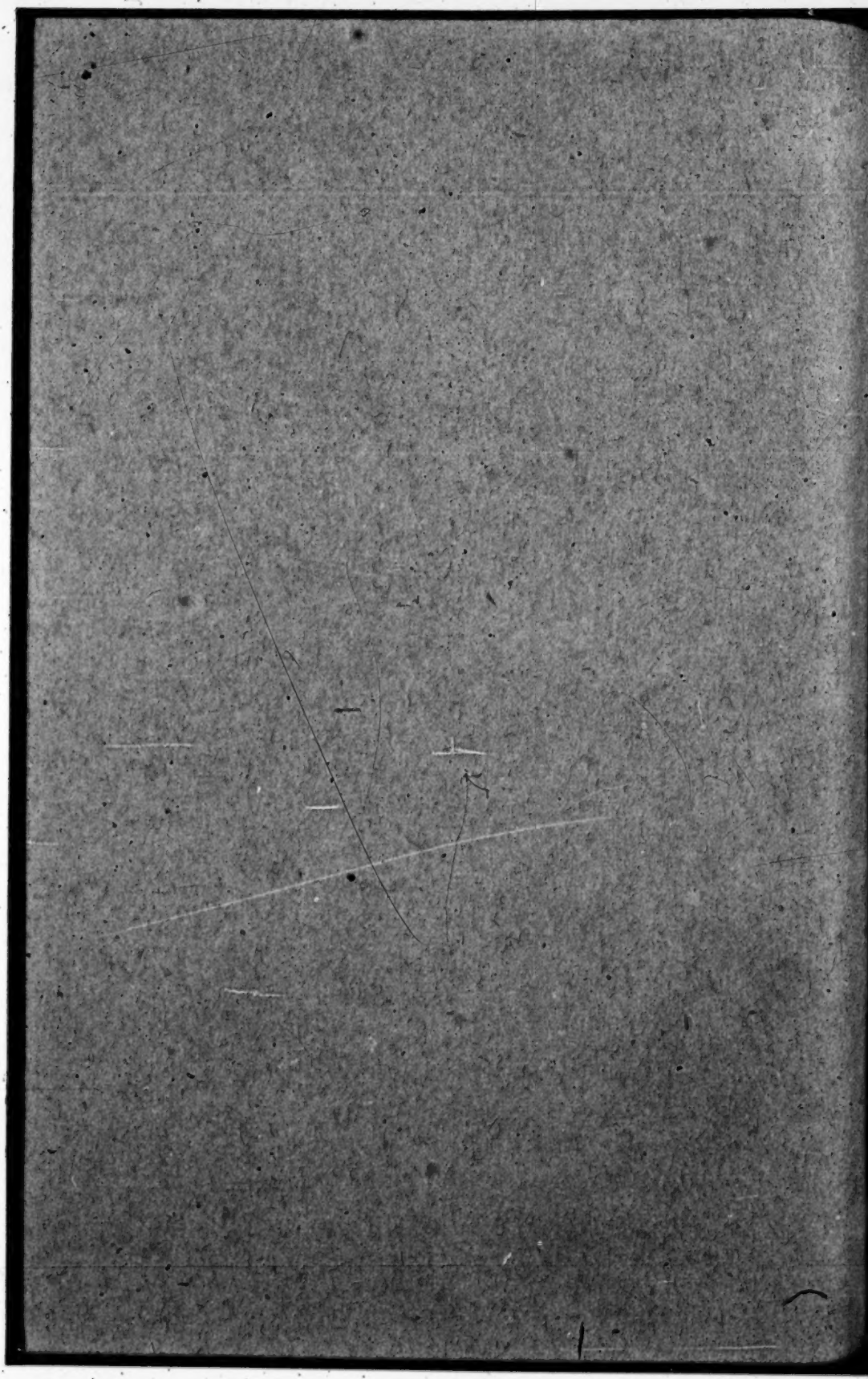
[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,955. Court of Claims. Term No. 824. Seth M. Milliken, Gerrish H. Milliken, and Harold A. Hatch, executors of the estate of Seth M. Milliken, deceased, petitioners, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed April 19, 1930. File No. 34,955.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 87

SETH M. MILLIKEN, GERRISH H. MILLIKEN and HAROLD A. HATCH, as Executors of the Estate of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN SUPPORT OF PETITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 824.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, as Executors of the Estate of Seth M. Milliken, deceased,

Petitioners,

v.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the Court of Claims (R. 14) is not yet reported.

Jurisdiction.

The judgment of the Court of Claims was entered February 17th, 1930, (R. 29). The Petition for Certiorari was filed April 19th, 1930. Jurisdiction to issue the Writ is conferred by Section 3(b) of the Act of February 13th, 1925, (43 Stat. 939).

The Question Presented

The sole question presented respects the constitutionality of the provisions of Section 402(c) of the Revenue Act of 1918 (40 Stat. 1097) in purporting to tax retroactively as a part of the net estate of a decedent dying after the effective date of that Act property transferred by him by way of a gift made in contemplation of death several years prior to the passage of the Act, in purporting to value such property for the purpose of such tax at its value at the time of death irrespective of its value at the time of the gift, and in purporting to impose the tax at the rates provided by such Act, such rates being approximately two and one half times as great as the rates provided by the somewhat similar Act in effect at the time of the making of the gift.

Statutes Involved

The pertinent provisions of the Revenue Act of 1918 under which the gift is sought to be taxed, together with the corresponding provisions of the 1916 Act in effect at the time of the making of the gift, are set forth in full in the Petition (R. 2-3).

Statement of Facts

In December, 1916, decedent herein made a gift to his three children, Gerrish H. Milliken, Seth M. Milliken and Margaret M. Hatch, of 2,713 shares of the capital stock of Minot Mills, Inc. Decedent died March 5th, 1920. The stock in question was not included as a part of decedent's estate under the Federal estate tax returns filed by the Petitioners herein as his executors.

Subsequently, the Commissioner redetermined the tax due in respect of said estate, included the stock in question

as constituting a gift made in contemplation of death within the purview of Section 811(c) of the Act, valued and fixed at the sum of $2,000,000 as representing its value at the time of decedent's death, and assessed an additional tax against the estate in the sum of $830,917.24, of which amount $811,360.41 resulted from the inclusion as a part of the taxable estate of the subject matter of the gift. This additional tax was duly paid, claim for refund was filed and denied, and suit for the recovery of the tax was brought in the Court of Claims, in connection with which suit Petitioners waived any right to assert that the gift in question did not in fact constitute a transfer in contemplation of death.

The Revenue Act of 1926 in effect at the time of the making of the gift imposed a tax at a minimum rate of 20% (being the rate on the amount of the net estate in excess of $10,000,000) (39 Stat. 777). This Act, with the subsequent amendments thereto, was repealed by Section 1400 of the Revenue Act of 1932 (47 Stat. 1669-1730), and in lieu thereof, Section 301 of the Revenue Act of 1932 (47 Stat. 2006) provided for a tax at rates running up to 25% on amounts of the net estate in excess of $10,000,000. The bulk of the tax here at issue was imposed at this 25% rate, a small portion being at the 22% rate fixed in respect of the amount of the net estate in excess of $9,000,000 and not in excess of $10,000,000. Accordingly, the rate of tax imposed was approximately two and one-half times as great as the rate to which the gift would have been subject if taxed under the Act in effect at the time it was made. Furthermore, for the purpose of fixing the tax, the property was valued by the Commissioner of Internal Revenue pursuant to the provisions of the Act at its value at the time of decedent's death, over three years subsequent to the time when he had completely, irrevocably, and permanently

divested himself of all interest and title in and to the property and of all dominion and control over it, without reference to the value of the property at the time of the gift or at any other time when it was in decedent's possession or subject to his control.

Petitioners claimed that the Act when so applied was so arbitrary and capricious, so lacking in reasonable and just relation to the classification proposed, as to be confiscatory and in violation of the Fifth Amendment to the Constitution and, in addition, amounted in effect to a direct tax, void for want of apportionment as required by Article I of the Constitution. The Court of Claims found that "the tax in question is not unconstitutional" (R. 22).

ARGUMENT.

a) Importance of the Issue.

The precise issue presented by this case has never heretofore been decided by any federal court. The principle involved is an important one and one of nation-wide import.

Judge Green in the opinion of the Court said (R. 22):

> "*Until the Supreme Court should specifically so state,* we cannot believe that it intended * * * to overrule the general principle that a law of Congress imposing a tax may be retroactive in its operation" (Italics ours).

and in the concurring opinion Judge Graham said (R. 29):

> "It has been *the policy of this Court* not to adjudge an Act of Congress unconstitutional" (Italics ours).

It seems reasonable to assume from these statements contained in the opinions of the Court of Claims that the judges of that Court regarded the issue as one which should be and which presumably would be finally passed upon by this Court.

Each of the Revenue Acts from 1916 to 1928, both inclusive, imposes a tax on property transferred by way of gift either made in contemplation of death or intended to take effect at or after death. Each of the four Acts from 1918 to 1926, both inclusive, repealed the last prior Act and enacted new provisions in substantially the same language as the prior Act so far as concerns gifts made in contemplation of death or intended to take effect at or after death, but with different tax rates, and specifically provided that the tax so imposed by such new Act and at the new rates should be given retroactive application. The question here presented is whether such retroactive application is within the constitutional powers of Congress.

It is submitted that, inasmuch as the case involves an important constitutional question which thus far has not been directly passed upon by this Court and which may arise under at least four different Acts of Congress, it should be reviewed by this Court.

b) Nichols *v.* Coolidge.

In *Nichols* v. *Coolidge*, 274 U. S. 531, Mrs. Coolidge and her husband in 1907 had conveyed property in trust to pay the income to the settlors and the survivor of them for life, then to distribute the corpus equally among the five children of settlors, the share of any child predeceasing such survivor to be paid to the persons entitled to take such child's intestate property under the statutes of dis-

tribution in effect at the time of such survivor's death. In 1917 the settlors joined in an assignment to the five children of their life interests previously reserved. Mrs. Coolidge died in 1921.

The Government asserted that the transfer was one intended to take effect at or after death within the contemplation of Section 402(c) of the 1918 Act and therefore subject to tax. This Court held (p. 543) that the Section in question

> "in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, its arbitrary, capricious and amounts to confiscation."

Petitioners claim that to include in a similar manner the value of property similarly transferred several years prior to the passage of the Act under which it is sought to be taxed, merely because the transferor at the time of the transfer may have thought he was about to die is even more clearly arbitrary, capricious, and confiscatory. In both cases, the theory of taxability advanced by the Government rests on the intent or frame of mind of the transferor at the time of the transfer, irrespective of subsequent events, irrespective of the irrevocable nature of the transfer, irrespective of changing values of the property, and irrespective of the fact that the Act under which the tax is asserted was not in existence at the time the transfer was made.

In the case of a gift intended to take effect at or after death, the full and unrestricted possession, use, and enjoyment of the property does not vest absolutely until the

donor's death. In the *Coolidge* case, for example, the Coolidge children could not "come into the full possession and enjoyment of the trust property; they could not exercise full dominion over it, sell or otherwise dispose of it" until the death of Mrs. Coolidge. (See opinion of District Judge Brewster, 4 Fed. (2d) 112, 115.)

In the case of a gift in contemplation of death, on the other hand, the entire interest, control, use, possession, and enjoyment of the property passes to the donee irrevocably and without limitation or qualification at the time of the gift. There is no retention by the donor of "control, possession or enjoyment" (see *Reinecke* v. *Northern Trust Company,* 278 U. S. 339, 348). There is no bringing about "at death, the completion of that shifting of economic benefits of property which is the real subject of the tax" (see *Chase National Bank* v. *United States,* 278 U. S. 327, 338; *May* v. *Heiner,* U. S. , decided April 14, 1930, not yet reported). The property is not as a consequence of death relieved from restrictions previously imposed under the transfer (see *Tyler* v. *United States,* U. S. , decided May 19, 1930, not yet reported). The subsequent death of the donor has no effect upon the property transferred or the donee's interest in and use and enjoyment of such property. His death is in no sense a "generating source" of transmission of the property or succession to it.

This Court in its opinion in the Coolidge case emphasizes one further feature as to which the case now under consideration is on all fours, and that is the arbitrary and capricious basis provided by the Act for measuring the tax. At page 542 of the decision in the *Coolidge* case, this Court said:

> "Property of small value transferred before death may have become immensely valuable and the

> estate tax, swollen by this, may leave nothing for distribution * * * Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died"

and what this Court there said is equally true in its application to the instant case. Judge Green, commenting in the decision of the Court of Claims on the objections raised by the Petitioners to this feature of the statute by which the tax on decedent's estate is measured by value of property long since disposed of, answered (R. 21) that these objections

> "might be urged with as much force in a case where the act, after its enactment, was applied to a transfer in contemplation of death as they could to a transfer made prior thereto. In both cases the value of property which the decedent had ceased to own is used to measure the tax".

There may well be grave doubt as to the validity of the method thus provided by the Act for measuring the taxable value of estates but, however arbitrary the method may be when applied to gifts made subsequent to the passage of the law, its capricious character is enhanced many fold when applied retroactively. Circuit Judge Hand, in *Frew* v. *Bowers* (12 Fed. 2nd, 625, 630; certiorari dismissed 275 U. S. 578), commenting on this method of measuring the tax, said:

> "As to transfers made after the law went into effect I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears to me that the result is too whimsical to stand. * * * Such a tax is fixed by the mere sport of fortune. It has no more

relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

c) Reenactment Theory.

Judge Graham of the Court of Claims in his concurring opinion (R. 22-29) seeks to draw a distinction between this case and the *Coolidge* case in that the original declaration of trust in the *Coolidge* case was made prior to the passage of the 1916 Act, the first of the series of Acts imposing a federal estate tax, whereas the gift in the present case, although made prior to the passage of the 1918 Act under which the tax was imposed, was made after the 1916 law imposing an estate tax and providing that such tax should apply to gifts made in contemplation of death had been passed. It is not claimed that the saving clause under the 1918 Act operated so as to subject the gift in this case to tax under that Act if the 1918 provisions failed to apply but, because Section 1400 of the 1918 Act (40 Stat. 1150) provides that where the 1918 Act imposes a tax in lieu of a tax under the repealed 1916 Act the provisions of the 1916 Act should remain in force until the corresponding tax under the 1918 Act took effect, Judge Graham argues that it was the manifest intention of Congress to carry forward the provisions of the 1916 Act here in question into the Act of 1918 and make them effective under the later Act by a reenactment "and that as to such reenactments the

provision as to repeal would not be effective" and this view, he states (R. 25), "is strengthened by the additional language of Section 402(c) of the Act of 1918, viz., 'whether such transfer or trust is made or created before or after the passage of this Act'."

The gift in question, if taxable under the 1916 Act, would have been taxed at 10%. Under the 1918 Act, substantially the entire amount was taxed at 25%. It is difficult to see how an Act specifically repealing an earlier law and imposing a tax two and one-half times as great as that provided for by the earlier law can be deemed to constitute a mere "reenactment" or "continuation" of the old law. Nor do the cases cited under Judge Graham's concurring opinion sustain this contention, for these are cases in which the liabilities sustained by the Court had accrued prior to the repeal of the Act in question and were upheld, not as liabilities under the new Act, but as liabilities accrued under the old Act on the general theory that the repeal did not operate to destroy accrued liabilities. If the facts of the present case could be brought within the purview of the cases cited by Judge Graham, such as *Campbell* v. *California,* 200 U. S. 87, and *Steamship Co.* v. *Joliffe,* 2 Wall. 450 (which they cannot), those cases would stand for the proposition that the tax should be imposed at the rates provided by the 1916 law and not the rates imposed by the 1918 law. But the 1916 Act and its rates were fully repealed by the 1918 Act and no claim is here made by the Government that a tax had accrued and should be paid under the 1916 Act.

Furthermore, this same contention has been advanced in numerous cases before the U. S. Board of Tax Appeals and there rejected (See *Duggan* v. *Commissioner of Internal Revenue,* 8 B. T. A. 482; *Crews* v. *Commissioner,* 8 B. T. A. 949; *Northern Trust Co.* v. *Commissioner,* 9 B. T. A. 96;

Johnson v. *Commissioner,* 11 B. T. A. 534; *Morsman* v. *Commissioner,* 14 B. T. A. 108), and it is respectfully submitted that this issue should be passed upon by this Court in order to avoid the confusion that would otherwise result from conflicting rulings of the Board of Tax Appeals and the Court of Claims.

d) "Necessary adjunct" Theory.

Neither can the imposition of the tax under circumstances such as here presented be sustained, as claimed by the Treasury Department, as a necessary adjunct to the legislative right to impose an estate tax and for the purpose of preventing evasion of such tax. Gifts in contemplation of death are gifts made *in extremis,* or at least under circumstances such that the impelling motive for the gift is the expectation of death in the near future.

Bearing this in mind, let us examine the possibility of creating, for the express purpose of evading the estate tax, a state of facts such as here presented. First of all, the gift would not be made until the donor had occasion to anticipate death in the reasonably near future for otherwise it would not be made in contemplation of death within the legal significance of those words and therefore would not be taxable. Secondly, having made such gift with death in the immediate or near future as the impelling motive, the donor would require the power to postpone the date of his death for several years and until such time as Congress might see fit to repeal the existing act and to enact a new law imposing different tax rates. Obviously, no such power exists. Therefore to say that it is necessary to sustain the retroactive provisions of Section 402 (c) in order to prevent evasion of estate tax laws is to imply that one may

regulate at will that which is beyond human power to control.

It is submitted that this fact was recognized by this Court in the *Coolidge* case, *supra*, when it said (p. 542):

> "Undoubtedly, Congress may require that property *subsequently* transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but *the right is limited by the necessity.*" (Italics ours.)

Judge Green, in the opinion of the Court of Claims, construes this language (R. 19) as meaning that there was an "open question" whether gifts in contemplation of death might be retroactively taxed, a question which the Court of Claims has answered in the negative. But since "the right is limited by the necessity" and, as has been shown, no necessity exists in respect of gifts made prior to the passage of the Act under which they are sought to be taxed, petitioners contend that the language above quoted constitutes an authority for the proposition that gifts *subsequently* made, and such gifts only, may be taxed.

e) Retroactivity of Excise Taxes Generally.

Although this Court has frequently sustained statutes imposing retroactively and within reasonable limits a direct tax, including federal income taxes, it has uniformly refused to sustain the imposition of an excise upon a transaction or event fully and irrevocably consummated prior to the passage of the taxing statute. This it has done not only

in connection with the estate tax but also in connection with the gift tax imposed by the Act of June 2, 1924. (See *Anderson* v. *McNeir*, 275 U. S. 577; *Blodgett* v. *Holden*, 275 U. S. 142; 276 U. S. 594; *Untermyer* v. *Anderson*, 276 U. S. 440.) In the present case not only does the Treasury Department seek to impose the tax retroactively but, as above pointed out, the property is taken at a value which it had attained years after the gift in question was made.

It is true that at the time of the making of the gift in question there was in effect an Act imposing a tax on gifts made in contemplation of death. But that Act had been repealed prior to decedent's death and a new law had been enacted imposing a tax two and one-half times as great. It is submitted that if Congress is without power to impose retroactively a tax at the rate of 10% in respect of a gift not taxable at the time it was made, it is equally without power to impose retroactively a tax at the rate of 25% on a gift which was taxable at the rate of 10% at the time it was made.

f) Summary.

The fact that the case involves a constitutional question of general importance and of a recurring nature, the fact that the decision of the Court of Claims is contrary to the principle adopted in numerous decisions of the Board of Tax Appeals, the fact that the decision of the Court of Claims cannot be reconciled with the principles enunciated in analogous cases decided by this Court, and the fact that the decision of the Court of Claims operates to produce an inequitable, capricious, and grotesque result in this and in other cases to which it may be applied, all suggest the de-

sirability of a decision by this Court definitely determining the issue here presented.

Conclusion.

It is respectfully submitted that a Writ of Certiorari should be granted.

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